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No. 00-1232

In the Supreme Court of the United States

RICARDO A. SANDOVAL, PETITIONER

v.

PAUL H. O'NEILL, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the district court did not abuse its discretion in refusing to award petitioner attorney's fees pursuant to 42 U.S.C. 2000e-5(k) where petitioner's counsel of record, the assignee of petitioner's right to any fee award, was not authorized to practice before the court, yet misled the court into believing otherwise, and where petitioner's lead trial counsel knowingly aided petitioner's counsel of record in his unauthorized practice of law and in his misrepresentations to the court.

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OPINIONS BELOW

The amended memorandum of the court of appeals (Pet. App. 1a-6a) is unreported. The order of the district court (Pet. App. 7a-40a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2000. A petition for rehearing was denied on October 30, 2000 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on January 29, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a Mexican-American employee of the United States Customs Service, was represented by the Law Offices of David L. Ross in the underlying action brought against respondent[1] pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for allegedly subjecting him to national origin discrimination and retaliation for engaging in activity protected by Title VII. Pet. App. 7a-8a.

The Retainer Agreement signed by petitioner and Ross indicated that Ross "expect[ed] to be performing most of the legal services on [petitioner's] behalf." Pet. App. 16a. The agreement also specified that petitioner assigned all rights in any fee award to the Law Offices of David L. Ross. *Id.* at 17a- 18a.

A ten-day jury trial was held on petitioner's complaint (Pet App. 8a), during which Ross supervised lead trial counsel David Spivak, who had not tried a case before. Ross "sat at counsel's table throughout the trial, attended *in camera* sessions, and participated at side-bars along with Mr. Spivak." *Id.* at 23a. The firm address on all of petitioner's pleadings was "Law Offices of David L. Ross, P.O. Box 18137, Beverly Hills, CA, 90209." *Id.* at 11a.

After the jury rendered a verdict in petitioner's favor, petitioner moved for an award of attorney's fees pursuant to 42 U.S.C. 2000e-5(k).[2] Pet. App. 8a-10a.

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[1] The current Secretary of the Treasury is substituted for the previously-named defendant pursuant to this Court's Rule 35.3.

[2] Section 2000e-5(k) provides:

> In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee (including expert fees) as

Ross submitted a declaration in support of the fee request in which he stated, under penalty of perjury, that (1) he was petitioner's attorney of record, (2) he had spent "a substantial number of hours" "supervising and assisting" Spivak, and (3) he had "assist[ed] in the preparation of trial and attending trial, organizing the presentation of evidence and witnesses, otherwise aiding in the trial of this matter and opposing [respondent's] post-trial motions." *Id.* at 22a. The motion for fees contained the representation that "[d]uring the last stages of trial preparation and the trial attorney Ross fully participated in the case." *Id.* at 25a.

The government opposed the fee request, based primarily on a fact that Ross and his associates had failed to bring to the court's attention: Ross was not licensed to practice law in the United States District Court for the Southern District of California, in which the trial was held, or in the State of California. Pet. App. 10a-11a.[3] The government argued that Ross, the assignee of any fees the court might award pursuant to the Retainer Agreement, had acted illegally in holding himself out as an attorney licensed to practice in that court, and should not be rewarded for such conduct. *Id.* at 11a. The government further argued that petitioner's other lawyers improperly aided Ross in his

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part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. 2000e-5(k).

[3] The United States District Court for the Southern District of California conditions admission to its bar on active membership in good standing in the California State Bar. Pet. App. 24a. As a resident of California with an office in that State, Ross was not eligible to appear *pro hac vice*. *Id.* at 21a.

misrepresentations, and therefore were likewise undeserving of a fee award.

In response, petitioner alleged that the Law Offices of David L. Ross was a "national" law firm and was properly practicing law in California by employing California lawyers. Pet. App. 11a. At a hearing on the fee issue, the district judge asked Spivak to submit "authority or information" supporting this assertion. *Ibid.* Petitioner's response to the court's request, however, contained no such authority or information. *Id.* at 12a, 28a-29a. Instead, the response proffered a new theory justifying Ross's representation of petitioner, arguing that the California lawyers employed to work on the case were entitled to attorney's fees because they legitimately used an "out-of-state" law firm name. *Id.* at 12a.

During the hearing, Spivak proffered yet another theory, arguing that even if the Law Offices of David L. Ross was a "multi-state" law firm, its representation of petitioner before the district court was proper because it had an active partner admitted to practice in California. In response to the court's questions, Spivak became "very evasive" and could not identify such a partner. Instead, Spivak protested that "the term 'partner' is a very loosely-defined term, and it could mean any number of things." *Id.* at 26a-27a. In light of Spivak's equivocations, the court stated that it would assume that such a partner did not exist. *Id.* at 28a.

Subsequently, Ross faxed the court a copy of a final judgment rendered nearly two years earlier by the Superior Court of the State of California in a case captioned *State Bar of California* v. *David L. Ross, individually, and David L. Ross, d.b.a. Law Offices of David L. Ross.* Pet. App. 12a-13a, 43a-48a. The judgment implemented a settlement agreement entered into

by Ross and the enforcement section of the State Bar of California, permanently enjoining Ross, the Law Offices of David L. Ross, their "servants, representatives [and] employees," and "all persons * * * acting under, by, through, or on behalf of" them, from "advertising, holding out, or directly expressing in writing or verbally, or otherwise implying that Defendant David L. Ross is a California licensed attorney or is practicing or entitled to practice law in the state courts of California." *Id.* at 44a. The judgment specified that defendants could "employ attorneys duly licensed by the State of California" to practice law on their behalf, and could practice law in any federal forum located within California "in which the [defendants] are admitted or are duly authorized to practice law." *Id.* at 45a. Ross did not explain why he had waited until "the eleventh hour" to bring this judgment to the court's attention. *Id.* at 13a.

2. In light of these circumstances, the district court denied petitioner's fee request. Noting that prevailing Title VII plaintiffs ordinarily are to be awarded fees "in all but special circumstances," Pet. App. 21a (quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978)), the court found that such "special circumstances" were present. First, the court noted that Ross, the assignee of the right to attorney's fees pursuant to the Retainer Agreement, was not licensed to practice law in the State of California nor in the Southern District of California, and was ineligible to appear *pro hac vice*. *Ibid.* The court detailed Ross's extensive supervisory role at trial, and noted that it had relied on Ross's "implicit representations that he was a duly admitted attorney in this jurisdiction." *Id.* at 23a. Because Ross "misled this court and has been improperly practicing law in this jurisdiction," the court

found that he violated Local Rule 83.3(b), which provides that "[o]nly a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order," and California Business and Professional Code § 6125 (West 1990), which provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar." *Id.* at 23a-24a.[4] The court further noted that Rule 1-300 of the Rules of Professional Conduct of the State Bar of California provides that members of the California Bar "*shall not aid any person or entity in the unauthorized practice of law.*" *Id.* at 24a (emphasis added by district court).

The court rejected petitioner's arguments that his other lawyers should be entitled to fees because (1) the Law Offices of David L. Ross is a "national" law firm and (2) the Law Offices of David L. Ross is an out-of-state law firm entitled to appear because it hires California attorneys. The court found no evidence in support of the first contention. Pet. App. 26a-29a. Regarding the second contention, the court found that (1) Ross is the sole partner of the Law Offices of David L. Ross, (2) the Law Offices of David L. Ross is located not out-of-state but in Beverly Hills, (3) "Ross was solely responsible to [petitioner] for the representations in this case and is the assignee of [petitioner's] right to attorneys' fees," (4) Ross did in fact work on the case, and (5) "[t]he fact that Mr. Ross hired or associated

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[4] As the court also noted, a person who holds himself "out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar" is guilty of a misdemeanor. Pet. App. 24a (quoting Cal. Bus. & Prof. Code § 6126(a) (West 1990)).

attorneys admitted to the California State Bar to prosecute his California cases does not shield him from the requirements of § 6125 or Local Rule 83.3." *Id.* at 29a-30a. Accordingly, the court declined to award attorney's fees to Ross or to petitioner's other lawyers, who, the court found, "aid[ed] Mr. Ross in his unauthorized practice of law in this state in violation of Rule 1-300 of the Rules of Professional Conduct of the State Bar of California."[5] *Id.* at 31a.

In further support of its decision not to award attorney's fees, the court noted that Spivak, petitioner's lead trial counsel, had engaged in a pattern of "bad faith practices" that "border[ed] on being flagrantly unethical and cannot be considered merely innocent mistakes." Pet. App. 31a. In particular, the court noted that during trial, Spivak made "repeated references" to an alleged "Nazi conspiracy" in the Customs Department—an allegation that the court had specifically ruled inadmissable in a pre-trial ruling. *Id.* at 32a. Furthermore, Spivak "consistently ignored evidentiary rulings and reasked improper questions, often three or four times." *Ibid.* These actions, the court found, needlessly prolonged the trial and incurred additional attorney's fees. *Id.* at 33a. Likewise, in the post-trial hearings and filings regarding the fee issue, Spivak continued his time-wasting and "mislead[ing]" tactics. *Ibid.* He refused to answer the court's request for verification of his assertion that the Law Offices of David L. Ross had a partner admitted to practice in California, made false statements regarding the substance of the Retainer Agreement, "shifted his factual contentions regarding the status of the Law Firm of

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[5] The court also referred its order to the disciplinary boards of the California State Bar and the Florida State Bar. Pet. App. 40a.

David L. Ross," and contradicted Ross's own declaration with regard to the nature of Ross's participation in the case. *Id.* at 33a-35a. The court found that this pervasive pattern of "gamesmanship and lack of professionalism," *id.* at 36a, served to bolster its conclusion that Ross's "implicit representations" that he was licensed to practice before it were "not the result of innocent error," and thereby "militate[d] against any equitable considerations for the awarding of attorneys' fees." *Id.* at 31a.

Finally, the court concluded that petitioner could not avail himself of the California Superior Court judgment that Ross had belatedly brought to the court's attention. Although petitioner had relied on the statement in the judgment that "[t]he Ross Defendants may employ attorneys duly licensed by the State of California to engage in the practice of law on behalf of the Ross Defendants," Pet. App. 45a, the court noted that the judgment did not permit Ross to practice lawfully before a California state or federal court without being admitted to such a court, nor did it countenance the misrepresentations by Ross and Spivak regarding Ross's status, *id.* at 39a-40a.

3. In an unreported memorandum disposition, the court of appeals affirmed the district court's denial of petitioner's fee request. The court held that the district court's finding that Ross had misrepresented his authorization to practice law before it was not clearly erroneous, and that "[t]he unauthorized practice of law and the misrepresentation of an attorney's status certainly create a special circumstance that would render a fee award to [petitioner's] counsel unjust." Pet. App. 5a. Thus, the court held, the district court did not abuse

its discretion in denying petitioner's request for attorney's fees.[6]

ARGUMENT

The court of appeals' decision was correct, and does not conflict with any decision of this Court or of any other court of appeals. Although prevailing Title VII plaintiffs ordinarily are entitled to attorney's fees, the district court did not abuse its discretion in denying fees in this case, given the extraordinary pattern of deception and misconduct by petitioner's counsel of record, who was not legally entitled to bring petitioner's case, yet who nevertheless knowingly led the court to believe that he was, and whose chief associate aided in his misrepresentations. Further review by this Court is therefore not warranted.

1. Title VII provides that a court "in its discretion, may" award fees to a prevailing party. 42 U.S.C. 2000e-5(k). In light of Congress's intent that civil rights plaintiffs act as "private attorney[s] general," this Court has stated that prevailing plaintiffs should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975) (specifically applying *Piggie Park* standard to Title VII plaintiffs).

Courts have found such "special circumstances" to exist when plaintiff's counsel has engaged in an extra-

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[6] The court of appeals modified the district court's judgment in one respect, specifying that "[b]ecause the fee award was denied on account of attorney misconduct and through no fault of the client, counsel may recover no attorneys' fees from [petitioner]," and directing the district court to incorporate a statement to that effect in its final judgment. Pet. App. 6a.

ordinary pattern of misconduct. See, *e.g.*, *Peter* v. *Jax*, 187 F.3d 829, 837-839 (8th Cir.), cert. denied, 529 U.S. 1098 (2000) (affirming district court's refusal to award fees to prevailing plaintiffs under 42 U.S.C. 1988,[7] as an alternative ground to the finding that plaintiffs were not "prevailing parties," because, *inter alia*, plaintiffs' counsel continued to litigate and incur fees despite knowing that a case pending in this Court would likely resolve the issue in dispute); *Fair Hous. Council* v. *Landow*, 999 F.2d 92, 97-98 (4th Cir. 1993) (denying attorney's fees under Section 1988 due to plaintiff's counsel's "outrageously excessive" fee request); *Lewis* v. *Kendrick*, 944 F.2d 949, 955-958 (1st Cir. 1991) (reversing district court's award of fees to prevailing plaintiff under 42 U.S.C. 1988 because, *inter alia*, plaintiff's counsel pressed "totally unsupported" claims and prepared clearly excessive fee request); *Brown* v. *Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980) (denying attorney's fees under Section 1988 due to plaintiffs' counsel's "intolerably inflated" fee request); *Greenbaum* v. *Svenska Handelsbanken*, 998 F. Supp. 301, 305 (S.D.N.Y. 1998) (refusing to award fees under 42 U.S.C. 2000e-5(k) for work spent on closing argument because closing argument was "rife with impermissible references and necessitated constant interruptions with appropriate objections"); cf. *White* v. *New Hampshire*

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[7] Cases involving fee shifting under 42 U.S.C. 1988 (1994 & Supp. IV 1998) are included here in light of this Court's recognition that fee-shifting under that statute is governed by the same standards as fee-shifting in the Title VII context. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983) ("The legislative history of [42 U.S.C.] 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.'") (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976)).

Dep't of Employment Sec., 455 U.S. 445, 454 (1982) (fees may be denied under Section 1988 if motion for fees "unfairly surprises or prejudices" opposing party or is untimely filed).

2. Because the lawyer in charge of plaintiff's case was not entitled to practice before the court, and because he and his associate repeatedly misled the court into believing otherwise, the district court did not abuse its discretion in finding that "special circumstances" warranted the denial of attorney's fees. Given the unique circumstances of this case, the denial of attorney's fees did not contravene the goals of the fee-shifting provision of Title VII.

As the district court found, Ross, petitioner's counsel of record, was not admitted to practice in California, and therefore was not entitled to practice before the district court. However, Ross, in conjunction with Spivak, "misled" the court into believing that he was so entitled, making "implicit representations that he was a duly admitted attorney" upon which the court had relied. Pet. App. 23a. Neither Ross nor Spivak ever presented any evidence in support of their shifting theories that purported to justify Ross's representation of petitioner despite Ross's inability to practice in California. The court noted that, pursuant to the Retainer Agreement between petitioner and his counsel, any fee award would be the property of the Law Firm of David L. Ross, and effectively of Ross himself (who had sole control over the firm), despite the fact that Ross was not authorized to practice before the district court or before the courts of the State of California. *Ibid.*

The court correctly drew further support for its denial of fees from the behavior of Spivak, the attorney who litigated the trial under Ross's supervision and

later defended the fee request. As the court noted, Spivak had acted "very evasive[ly]" when asked for evidence to support his argument that Law Offices of David L. Ross had an active partner admitted to practice in California—a request with which he did not, and apparently could not, comply. Pet. App. 27a. Still more troubling to the court was Spivak's pattern of misleading, contradictory, and false statements, his dilatory trial tactics, and his constant flouting of the court's rulings. As the court correctly noted, this pattern of misconduct helped exclude any possibility that Ross's and Spivak's failure to inform the court of the fact that Ross was not authorized to practice before it was the result of "innocent error." *Id.* at 31a.[8]

Furthermore, the court's denial of attorney's fees under the extraordinary facts of this case does not contravene Congress's intention that attorney's fees serve as an incentive for lawyers to bring civil rights lawsuits that, for want of a lawyer, might not otherwise be filed. In essence, the court denied fees because Ross, the counsel of record, simply was not entitled to file this case in the first place. Any disincentive effect

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[8] Petitioner contends that "the district and circuit courts abused their discretion when they denied Petitioner's attorney's fees *in toto*, even as to the California licensed lawyers for work performed by them." Pet. 12. However, as the district court noted, Ross was the sole assignee of the right to attorney's fees pursuant to the Retainer Agreement signed by petitioner. Pet. App. 21a. Furthermore, "all the attorneys involved in plaintiff's trial were employed at the Law Offices of David L. Ross." *Id.* at 22a-23a. Finally, the district court found that Spivak, petitioner's lead trial counsel, aided and abetted Ross in his scheme to mislead the court regarding his status, in violation of Rule 1-300 of the Rules of Professional Conduct of the State Bar of California. *Id.* at 31a, 33a-34a.

caused by the denial of fees in such an instance will merely dissuade unlicensed lawyers from bringing cases in jurisdictions in which they are not allowed to practice. The denial of fees in this highly unusual situation will have no effect on duly licensed attorneys who file cases in jurisdictions where they are authorized to do so.[9]

3. a. Petitioner suggests two justifications for this Court's review of the court of appeals' decision, neither of which has substance. Petitioner suggests, first, that the decision "conflicts with established precedent of this Court." Pet. 6. Yet petitioner identifies no precedent of this Court, or of any other federal court, with which the court of appeals' decision may be said to "conflict." Instead, petitioner merely cites this Court's precedents establishing that prevailing Title VII plaintiffs *ordinarily* should receive fee awards in the absence of "special circumstances." Pet. 7. The district court here expressly adopted and applied this standard, and its finding that special circumstances were present here does not constitute an abuse of discretion. Petitioner identifies no precedent establishing that the fact that the assignee of the fee award was not authorized to practice before the court, yet misled the court into believing that he was, cannot be treated as a "special circumstance" justifying the denial of fees. In fact, it is well-established that an attorney's lack of authorization to practice before the relevant court generally divests an attorney of any right to collect fees from his or her client. See, *e.g.*, *Z.A.* v. *San Bruno Park Sch. Dist.*, 165

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[9] Nor will the denial of fees in this case exert any disincentive effect on Title VII plaintiffs themselves, because the court of appeals directed the district court to specify that counsel could not seek to recover fees from petitioner. Pet. App. 6a.

F.3d 1273, 1275-1276 (9th Cir. 1999); *Birbrower, Montalbano, Condon & Frank, P.C.* v. *Superior Court*, 949 P.2d 1, 10 (Cal.), cert. denied, 525 U.S. 920 (1998).

Rather than identifying any precedent of this or any other Court establishing that a district court abuses its discretion by denying fees under circumstances similar to those presented here, petitioner merely proffers the unsupported assertion that the Law Offices of David L. Ross is a "national" (Pet. 3, 10, 11) or "interstate" (Pet. i, 3) law firm properly practicing law in California. But petitioner made the same assertion, similarly unsubstantiated, before the district court, and when the court requested supporting information petitioner provided none, switching instead to the theory that the Law Offices of David L. Ross was an "out-of-state" firm. Pet. App. 11a-12a, 26a-29a. Having failed to avail himself of the ample opportunities the district court afforded him to substantiate this assertion, petitioner cannot complain that the district court erred in failing to rely on it—particularly in light of petitioner's continued failure to substantiate this assertion.[10]

b. Second, petitioner suggests that this Court should grant certiorari for the purpose of "articulat[ing] the confines of what are 'special circumstances'" justifying the denial of fees to a successful Title VII plaintiff. Pet. 6. Petitioner alleges that the Court has fomented confusion among the lower courts by "creating an exception without the aid of definite criteria" to the

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[10] Petitioner's claim that "the California Bar sanctioned and approved of this law firm structure" (Pet. 10 n.8) misses the point. The district court did not deny petitioner's fee request because it found fault with the "structure" of the Law Offices of David L. Ross, but rather due to Ross's participation in the case, his misrepresentations to the court, and his associates' assistance in supporting his misrepresentations.

presumption that prevailing Title VII plaintiffs are to be awarded attorney's fees. Pet. 8. However, petitioner identifies no conflicting cases in the lower courts, much less any case that awards attorney's fees to a lawyer who engaged in the pattern of deception evident in this case, and he does not even attempt to articulate what "definite criteria" this Court should set forth.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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